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TO EXPEDIENCY AND BEYOND: VERMONT'S ROCKET DOCKET

Tracy Bach*

I. BACKGROUND

For decades appellate courts across the country have struggled to stay on top of ever-expanding caseloads. As Thomas Marvell observed, “[t]he appellate caseload explosion and the resulting pressures on the courts are hard to exaggerate. Appeals have been doubling about every decade since World War II, placing extreme demands on judges to increase output.”¹ By way of comparison, the rate of growth in appellate dockets between 1973 and 1983 “far outstripped increases in the nation’s population (ten times faster), the number of trial judgeships (four times faster), and the number of appellate judgeships (three times faster).”² States have experienced stunning growth during this decade: the total number of state appeals increased by 112%, with some individual state dockets leaping by 305% (Alaska).³

Many approaches to managing burgeoning dockets have been tried, including creating intermediate appellate courts, requiring unpublished opinions, limiting access via petitions of certiorari, and encouraging parties to waive oral argument.⁴ In

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1. Thomas B. Marvell, *State Appellate Court Responses to Caseload Growth*, 72 *Judicature* 282, 282 (Feb./Mar. 1989).

2. Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 *Colum. L. Rev.* 373, 373 (1991) (citing Thomas B. Marvell, *Is There An Appeal From the Caseload Deluge?* 24 *Judge’s J.* 34, 36 (1985)).

3. *Id.* Connecticut’s appeals increased by 265% during the same period. *Id.*

4. Marvell has organized these various individual state reforms into seven categories: 1) adding judges, 2) creating or expanding intermediate appellate courts, 3) using panels

the first nationwide study of appellate court changes, Marvell chronicled the experience of forty-five states from 1968 to 1984, and concluded that each state had tackled its individual caseload crisis in its own fashion, according to the local culture and with no one approach uniformly accepted.⁵

Responses to growing state appellate dockets not only derive from local culture, but also from a reviewing court's role in the United States system of justice. Appellate review is recognized as having two distinct functions: first, fixing relatively clear-cut errors made by courts of original jurisdiction, and second, making new law and systematizing it.⁶ In that first capacity, "appellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies."⁷ In the second role, reviewing courts "announce, clarify, and harmonize the rules of decision employed by the legal system in which they serve."⁸ Attempts at expediting appellate review with an eye toward addressing heavy dockets must account for this "traditional duality"⁹ because efficiency gained in processing appeals may

rather than full courts, 4) relying more on law clerks and staff attorneys, 5) deciding cases without opinions or with unpublished or memorandum opinions, 6) limiting the availability of oral argument, and 7) using summary judgment procedures. Marvell, *supra* n. 1, at 282.

5. *Id.* at 291.

6. See e.g. Paul C. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice On Appeal* 2 (West 1976) ("In the received tradition, the functions of appellate adjudication are two-fold. One is to 'review for correctness.' . . . The second function . . . is sometimes described as the 'institutional' review.").

7. *Id.* The authors go on to observe that this "review for correctness serves to reinforce the dignity, authority, and acceptability of the trial" because "[t]he availability of the appellate process assures the decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its system." *Id.*

8. As the authors reason, "[t]rial courts working independently have no self-regulating capacity to promote uniformity among their decisions. Without appellate review, such great divergences in practices and variations in results would arise between trial courts in the same system that they would jeopardize the belief that legal principles are a vital force in their decisions or provide a basis for predicting the application of official power." *Id.* at 2-3.

9. *Id.* at 3. Notably, the authors warn that "the line between the two functions has not been easy to maintain, and it may be harmful as well as futile to try too strenuously to do so." *Id.* at 4.

pit one of these functions against the other. For example, decreasing appellate backlog via unpublished or summary opinions could compromise the second appellate function by not announcing, clarifying, and harmonizing legal rules publicly in writing.

Even though creating intermediate appellate courts is the most expensive option for expediting appeals, most states have gone this way in the past forty years because of the efficiency in processing appeals this measure offers.¹⁰ In 1957, only thirteen states operated mid-level courts of appeals.¹¹ By 1987, twenty-five more states had created an intermediate appellate court.¹² As of January 2002, only eleven states and the District of Columbia lack an intermediate court of appeals, as listed below in Table 1. Notably, these states tend to have relatively small populations and appellate caseloads.

Other states have responded to the delays caused by caseload growth by having the state's high court sit in panels. According to Marvell's study, as of 1984, thirteen state supreme courts have sat in panels, and another eleven did so until an intermediate court was created or expanded.¹³ Clearly panels serve as an intermediate step to the creation of a formal intermediate appellate court for some states.¹⁴

10. Marvell provides a reasoned description of how this efficiency is achieved. "Since all [intermediate appellate court] decisions can be reviewed by the supreme court (except in Florida and, for a few cases, in Texas), the relief to the supreme court derives largely from three factors: 1) the portion of cases decided by the intermediate court that result in petitions for review; 2) the difference between the work required to decide appeals on the merits and that required to decide the petitions for review; and 3) the number of the petitions accepted and, thus, granted full review. In practice, a sizable portion of appeals end after the intermediate court decision; petitions require relatively little work, and a very small percentage of the petitions are granted." Marvell, *supra* n. 1, at 285.

11. Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 56 (W. W. Norton 1994) (noting that this number represents an increase of only six courts over a sixty-six-year span).

12. *Id.* Not only did the number of courts of appeals increase rapidly, but they also quickly became the backbone of the review system: "[intermediate courts of appeals] are clearly the workhorses of state appellate systems," remarked a 1989 report on state court caseload statistics. *Id.* Not only do these reviewing courts handle all appeals as of right, but they effectively serve as the court of last resort for most appellants, given the low percentage of cases taken by state supreme courts on discretionary review. *Id.*

13. Marvell, *supra* n. 1, at 285.

14. Interestingly, because eleven courts discontinued use of panels in favor of an intermediate court, Marvell reads this change in numbers as rendering panels to be "the

TABLE 1—STATES WITHOUT COURTS OF APPEALS

State	Population	Appellate Cases Filed
Vermont	608,827	584
Wyoming	493,782	355
D.C.	572,059	1,783
North Dakota	642,200	382
South Dakota	754,844	498
Montana	902,195	706
Rhode Island	1,048,319	574
New Hampshire	1,235,786	826
Maine	1,274,923	752
West Virginia	1,808,344	3,539
Nevada	1,998,257	1,894

II. THE ROCKET DOCKET

Small jurisdictions like Vermont have sought creative approaches to their growing caseloads short of creating new appellate courts. After studying other states' caseload management innovations,¹⁵ Vermont developed a summary disposition procedure¹⁶ fondly nicknamed the "Rocket Docket."¹⁷ This expedited appeals process determines which kind of reviewing function a case presents and then uses two distinct tracks for reviewing trial court decisions. Cases that call for the supreme court's review for correction of error are set for summary disposition before a three-member panel of justices,

least popular change," because so many courts tried the method, but then discontinued or curtailed it. *Id.* at 291.

15. Reporter's Notes, V.R.A.P. 33.1 (noting review of procedures in Rhode Island and New Hampshire, as well as general secondary sources like the American Bar Association's Standards Relating to Appellate Courts and Carrington, Meador, and Rosenberg's *Justice on Appeal*).

16. V.R.A.P. 33.1.

17. *State v. Mills*, 706 A.2d 953, 954 (Vt. 1998) ("Because of the prompt disposition of these cases, the summary disposition procedures have come to be known as the "rocket docket.").

which hears them and quickly issues decisions. Those cases that require the court to make new law proceed at the regular pace.

A. The Launching

The Vermont Supreme Court implemented the Rocket Docket in May 1991, with the clear intention to cut its growing backlog.¹⁸ The court's annual caseload did not suddenly expand during the years leading up to 1991, averaging around 550 per year,¹⁹ but the backlog of pending cases had increased dramatically before implementation of the Rocket Docket, rising from 407 in 1981 to 777 in 1988.²⁰ As the full court explained in the 1998 case challenging the Rocket Docket's constitutionality, "[a]cting in response to the large backlog and excessive delays that had developed in its operations, this Court in 1990 established a special summary procedure for simpler cases, primarily those applying settled law to the facts involved."²¹

The original rule governing these expedited appeals, Vermont Rule of Appellate Procedure 33.1, was adopted as a two-year experiment, the main goal of which was "the more efficient and appropriate handling of appeals, which have traditionally varied greatly in subject matter and complexity."²² At the time of Rule 33.1's adoption, the court's growing caseload "threaten[ed] to impair the fair, careful and reasonably prompt review to which each litigant is entitled."²³

18. See Reporter's Notes, V.R.A.P. 33.1. The court has emphasized "that we must control the management of the courts to fulfill our obligation to provide justice to those who appear before us. The summary procedure created by V.R.A.P. 33.1 is a caseload management policy adopted to enable us to respond to our caseload with the resources available." *Mills*, 706 A.2d at 956.

19. *A Guided Tour of the Rocket Docket—Its System and Statistics*, Vt. Bar Journal 16, 17 (Dec. 1999) [hereinafter *Guided Tour*].

20. *Id.*

21. *Mills*, 706 A.2d at 954. Later the court describes the "practical reason" behind this expedited appellate process as "to produce expeditious decisions in the face of increases in workload." *Id.* at 955.

22. Reporter's Notes—1993 Amendment, V.R.A.P. 33.1.

23. Reporter's Notes, V.R.A.P. 33.1.

B. The Nuts and Bolts of the Rocket Docket

Rule 33.1 sets out the foundational principle for selecting cases for expedited appeals: “In any case, the Court, if all members not disqualified agree, may order that the matter be set for oral argument before a panel of three justices.”²⁴ The actual process used to select cases appropriate for the Rocket Docket is a thorough one, with redundancy built into the screening procedure so that cases not suited for expedited appeal have multiple opportunities to return to the full review track. Notably, this screening is performed by both professional staff and the justices themselves, thereby addressing the concern frequently raised about over reliance on support staff when selecting cases for expedited review.²⁵

Once counsel has completed a docketing statement,²⁶ supreme court staff counsel choose cases as potential candidates for the Rocket Docket.²⁷ Cases are excluded if 1) the court may establish a new rule of law, alter or modify an existing rule, or apply an established rule to a new fact situation; 2) the matter on appeal includes an issue of “substantial public interest”; 3) the court may criticize existing law; or 4) the court may resolve a conflict among panels of the court.²⁸ After excluding these cases, staff counsel select the “simple cases” that claim an error in the application of settled law or present one clearly dispositive issue.

Cases may also be recommended for the Rocket Docket by one of the five Vermont Supreme Court justices sitting as a “screening justice.” Assigned this duty in rotation every three months, one justice reviews briefs submitted on non-Rocket Docket cases and selects additional candidates that fit the criteria for expedited review. This screening takes place before

24. V.R.A.P. 33.1(a).

25. See Ellerson, *supra* n. 2, at 390 (screening procedures may “allow staff attorneys to intrude upon the province of the court and adversely affect the collegiality of decision making”).

26. See V.R.A.P. 3(e) (providing for filing of a docketing statement and showing its standard form).

27. *Guided Tour*, *supra* n. 19, at 16.

28. *Id.*; cf. V.R.A.P. 33.2(b). The Reporter’s Notes point out that this rule was formerly codified in an administrative order.

selection of the panel or opinion author, and staff attorneys do not participate.²⁹

Once this pool of Rocket Docket candidates is formed, a new process for assessing each case's placement on the docket begins. Staff counsel prepare a memorandum on each case, describing its facts and legal issues, and make a recommendation on whether it should go forward on the expedited docket. These memoranda are then periodically distributed to the five justices with a written ballot and without formal conference, the justices vote on which cases to retain. A case is finally assigned to the Rocket Docket only after a unanimous decision by all justices not disqualified. If the vote is four to one, the lone dissenter may be asked if he or she wants to change the vote; any one justice, however, may request full court treatment.³⁰

After placement on the Rocket Docket, a case is reviewed by a panel of three justices. Each of the three justices is assigned to write every third case and will review the briefs, reach a tentative decision, have staff counsel prepare a draft opinion, review and edit that draft opinion, and circulate this draft—all before oral argument.³¹ Through this process, all three justices are afforded one more opportunity to reassign the case to the full court.

After oral argument or review of the briefs, the three-member panel conferences and makes its decision using the draft opinion as the starting point. The goal is to issue the decision by the end of the working day following argument.³² The decision comes in the form of an entry order, an unpublished opinion that includes a short explanation of the decision.³³ The decision must be unanimous; otherwise, the case is reset before the full court for disposition.³⁴

29. *Guided Tour*, *supra* n. 19, at 16.

30. *Id.*

31. *Id.* Just as on the regular docket, oral argument occurs on the Rocket Docket if the party requests it, although V.R.A.P. 33.1(a) permits the court to order a Rocket Docket case submitted solely on briefs if all parties of record are represented by counsel. Argument on the Rocket Docket is limited to five minutes per side. *Id.* at 17.

32. *Id.* at 17.

33. V.R.A.P. 33.1(c) ("An entry order decision issued by a three-justice panel that is not published in the Vermont Reports may be cited as persuasive authority but shall not be considered as controlling precedent. Such a decision may also be cited and may be

Overall, the system has five “check points” for verifying the appropriateness of using the Rocket Docket to resolve an appeal: (1) on review of the docketing sheet, (2) on review of the brief, (3) after staff recommendation, (4) during preliminary opinion writing, and (5) in the panel’s conference.³⁵

Moreover the requirement that all decisions on the Rocket Docket be unanimous ensures that the matter has been resolved by a majority of the full court. This idea was critical to defeating a challenge to the Rocket Docket’s constitutionality under the Vermont Constitution. In the 1998 challenge, four criminal defendants argued that Chapter II, section 29, of the Vermont Constitution³⁶ requires “a collective process of deliberation of all justices”³⁷ available to participate in supreme court cases.³⁸ The court disagreed, reasoning that all available members had participated by voting affirmatively to refer the case to the three-justice panel, and that unanimity of the three-justice panel ensured that the outcome would not have been different on the full docket.³⁹

controlling with respect to issues of claim preclusion, issue preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued.”); see also Reporter’s Notes—1999 Amendment, V.R.A.P. 33.1 (“Rule 33.1(c) is added to clarify the status of entry order decisions of three-justice panels convened for summary decision of cases pursuant to Rule 33.1. Unpublished opinions of the three-justice panels have some weight as indicative of the views of a majority of the Court on issues considered. For a number of reasons, however, such opinions cannot be considered controlling statements of Vermont law on those issues, binding on all courts until expressly overruled by the Supreme Court. Entry order opinions, ordinarily, are not published in the Vermont Reports and thus do not have official status as decisions of the Supreme Court and are not available to all lawyers and citizens. Moreover the brevity of the argument and consideration of the issues and lack of deliberative participation by two members of the Court mean that all judges, lawyers, and members of the public should be on notice that the full Court may reach a different result when the same issues are fully presented and considered. In light of these considerations, new Rule 33.1(c) gives unpublished three-justice entry order decisions persuasive effect only. Like trial court decisions, or the advisory opinions that some state high courts have power to issue, three-justice opinions may be cited and argued in other cases but are not controlling precedent in those cases.”).

34. V.R.A.P. 33.1(b).

35. *Guided Tour*, *supra* n. 19, at 17.

36. Section 29 states that “[t]he Supreme Court shall consist of the Chief Justice of the State and four associate justices of the Supreme Court.”

37. *State v. Mills*, 706 A.2d 953, 954 (Vt. 1998).

38. Excluding those disqualified or ill, or a vacant position of the court. *Id.*

39. *Id.*; see also *Ryan Supply Co. v. Brett*, 75 So.2d 721, 721-22 (Miss. 1954) (upholding the Mississippi Supreme Court’s power to sit in five-member panels as long as the panel voted unanimously, concluding that a full court review was not necessary “since

C. Post Take-Off: The Numbers

Since the adoption of the Rocket Docket in Vermont, the court's backlog has decreased. Notably, in 1988 there were 777 pending cases, which dropped to 561 in 1991 after the Rocket Docket was fully implemented. By 1998, the figure had dropped to 435.⁴⁰ The number of cases waiting for eighteen months or more has significantly decreased, from a high of 209 in 1987 to 106 in 1991 and twenty in 1998.⁴¹ Annual statistics since the Vermont Bar Association's 1998 review indicate that overall, the backlog has remained steady.

The Court's caseload has averaged about 550 appeals per year, with 1981 as low as 508 and 1998 as high as 552 appeals; since 1991, only two years saw cases surpass 600.⁴² During the initial two-year experimental period, almost 300 cases were heard and decided on the Rocket Docket. Most of these cases were decided within a few days of argument or brief submission.⁴³ During the first five years of operation, almost 1900 cases were decided by the Vermont Supreme Court, with slightly more than half of these on the Rocket Docket. A little more than half of all civil cases and a little less than half of the criminal cases were expedited, as illustrated by Table 2 below.

TABLE 2⁴⁴—CASES DECIDED, 1/93 - 9/98

	Rocket Docket	Full Court	Total
Civil	688 (53%)	615 (47%)	1,303
Criminal	203 (44%)	263 (56%)	466
Juvenile	62 (50%)	60 (50%)	122
Total	953 (50%)	938 (50%)	1,891

With respect to the relative outcome on each docket, the Rocket Docket Review Committee concluded that "prosecutors

the votes of the Judges who originally considered the case, being five in number, would control the decision to be rendered by the entire group of nine").

40. *Guided Tour*, *supra* n. 19, at 17.

41. *Id.* at 18.

42. *Id.* at 17.

43. Reporter's Notes—1993 Amendment, V.R.A.P. 33.1.

44. *Guided Tour*, *supra* n. 19, at 17.

fare the best on the Rocket Docket (even better than they do before the full Court), and criminal defendants, private parties in juvenile cases, and [the State of Vermont's Department of Social and Rehabilitation Services, shown in the following table as] SRS fare the worst by far."⁴⁵ Using these categories, Table 3 illustrates the relative outcomes of Rocket Docket and full court cases.

TABLE 3⁴⁶—COURT ACTION BENEFITTING APPELLANT
1/93 - 9/98

Appealing Party		Rocket Docket	Full Court
Civil	plaintiffs' appeals	18%	32%
	defendants' appeals	15%	38%
Criminal	prosecution's appeals	63%	58%
	defendants' appeals	5%	18%
Juvenile	SRS appeals	0%	27%
	private parties' appeals	5%	20%
All appeals, all appellants		15%	33%

III. CONCLUSION: "THAT'S ONE SMALL STEP FOR VERMONT . . ."
OR "HOUSTON, DO WE HAVE A PROBLEM?"

So, what do these numbers mean? Now, a decade after the launch, can we determine whether Vermont's home-grown brand of expedited appeal serves the state's litigants fairly while achieving greater efficiency? The Vermont bench and bar appear satisfied with the efficacy and fairness of the Rocket Docket to

45. *Guided Tour*, *supra* n. 19, at 17.

46. *Id.*

date.⁴⁷ The numbers suggest that both civil and criminal litigants have an equivalent chance of being channeled into this expedited appeal process. Moreover the only published study on the performance of the Rocket Docket suggests that the backlog of cases at the Vermont Supreme Court has decreased since the start of this summary disposition procedure, albeit modestly.⁴⁸

But, just as rockets can soar high and fast, they nonetheless can sometimes miss their mark. With almost half of all high court cases receiving expedited treatment, Vermont may risk limiting development of its common law. Rocket Docket cases result in unpublished opinions; while these brief summaries represent the law of the case and are available to the affected parties, they provide no future guidance for similarly situated parties in later cases. As long as the tracking process accurately separates those cases needing only review for error from those poised to make new law, the Rocket Docket should weed out the simple cases that do not contribute to the fabric of the state's common law. But even a small margin of error can have a noticeable cumulative impact over the long term, given the small number of cases decided by the court each year.

In addition, these unpublished opinions are provided to the lower courts, which would appear to encourage reference to (if not reliance on) them. But Rocket Docket decisions are not indexed, which renders use of them painstaking and potentially haphazard, relative to reported cases. Thus the outcomes of these expedited appeals—again, fully half of all cases reviewed by the state's highest court—remain only somewhat accessible and, of course, in the tantalizing zone of being persuasive but not binding.

Finally, the continued backlog numbers and the complex screening procedure suggest that the Rocket Docket may not be as expeditious as intended. Although it appears to treat different categories of appellants even-handedly (*vis-a-vis* the full docket), to do so presently entails a case selection process that

47. *Id.*; Reporter's Notes—1993 Amendment, V.R.A.P. 33.1 (“It is the determination of the Court and the view of most lawyers familiar with the process that the experiment has been successful and that the rule should be made permanent.”).

48. *Guided Tour*, *supra* n. 19, at 18. The Committee observed that it was not clear that the backlog reduction was directly attributable to the Rocket Docket's implementation.

heavily involves each justice. The question remains whether the current system truly expedites appellate review.

Vermont is a place where “small is beautiful” still operates in real life. Village political life is governed by the town meeting and Montpelier, the state capital, is the smallest in the United States. Yet Vermonters experience legal conflicts and resort to the courts in increasing numbers to resolve them. Thus the need to address the caseload at our sole appellate court is necessary. In light of the available strategies for expediting judicial review, an initial review of the Rocket Docket suggests that it strikes a reasonable balance among efficacy, cost-effectiveness, and fairness. It is less expensive than an intermediate court of appeals and more accessible to the public than state supreme courts that use certiorari to limit their dockets; moreover, it thoughtfully seeks to tailor judicial resources appropriately to the kind of case on appeal. Nonetheless the bench and bar should continue to review the number and kinds of cases that “ride” the Rocket Docket, to assess the ongoing fit of this expedited appellate process.